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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT TACOMA

8 LEO B. BUNKER,

9 Petitioner,

10 v.

11 JERI BOE,

12 Respondent.

CASE NO. C18-5243 BHS

ORDER ADOPTING REPORT  
AND RECOMMENDATION

13 This matter comes before the Court on the Report and Recommendation (“R&R”)  
14 of the Honorable David W. Christel, United States Magistrate Judge, Dkt. 17, and  
15 Petitioner Leo B. Bunker’s (“Bunker”) motion to appoint counsel, Dkt. 18.

16 **I. FACTUAL AND PROCEDURAL HISTORY**

17 On March 26, 2018, Bunker filed a petition for writ of habeas corpus under 28  
18 U.S.C. § 2254. Dkt. 1. On September 12, 2018, Judge Christel issued a R&R  
19 recommending this Court deny the petition. Dkt. 11.

20 On December 13, 2018 the Court adopted the R&R in part, denying Bunker’s  
21 ineffective assistance of counsel claims but referring a newly-raised prosecutorial  
22 misconduct claim back to Judge Christel. Dkt. 13.

1 On February 27, 2019, Judge Christel issued the instant R&R concluding that the  
2 prosecutorial misconduct claim is procedurally barred and recommending that the Court  
3 deny Bunker's petition with prejudice. Dkt. 17 at 2. Judge Christel directed the parties to  
4 file written objections within fourteen days of service of the R&R. *Id.* at 16 (citing 28  
5 U.S.C § 636(b)(1) and Fed. R. Civ. P. 72(b)).

6 On March 11, 2019, Bunker filed a motion to appoint counsel. Dkt. 18. On March  
7 25, 2019, Respondent Jeri Boe ("Boe") responded in opposition. Dkt. 19.

## 8 II. DISCUSSION

### 9 A. Motion to Appoint Counsel

10 Under the Criminal Justice Act, the court may appoint counsel for a § 2254  
11 petitioner whenever "the interests of justice so require." 18 U.S.C § 3006A(a)(2)(B); *see*  
12 *also* 18 U.S.C. § 2254(h). A petitioner in collateral postconviction review proceedings  
13 has no constitutional right to representation. *Pennsylvania v. Finley*, 481 U.S. 551, 555  
14 (1987).

15 If his motion is construed liberally, Bunker asserts that counsel is needed to help  
16 articulate the truth of his prosecutorial misconduct claim, in which he contends the  
17 prosecutor at his trial improperly suppressed victim phone records that supported  
18 acquittal. Dkt. 18 at 1–2; *see also* Dkt. 3 at 11. As the R&R discusses, however, Bunker  
19 failed to raise prosecutorial misconduct in a direct appeal or a personal restraint petition  
20 filed in the Washington courts, raising it for the first time in a petition seeking review of  
21 the denial of his personal restraint petition. Dkt. 17 at 4. Because Bunker failed to fairly  
22 present the issue to the state appellate courts and now would be time barred from doing

1 so, the R&R properly concluded that the prosecutorial misconduct claim was  
2 unexhausted and procedurally defaulted. *Id.* at 7–15; *see generally Casey v. Moore*, 386  
3 F.3d 896 (9th Cir. 2004). Considering the posture of this claim, Bunker fails to  
4 demonstrate that the interests of justice require the appointment of counsel. Therefore, the  
5 Court declines to appoint counsel to represent Bunker.

6 Moreover, the Rules Governing Section 2254 Cases in the United States District  
7 Courts do not contemplate the appointment of counsel absent the court’s grant of an  
8 evidentiary hearing or discovery. Rule 6(a), 8(c) of the Rules Governing Section 2254  
9 Cases. This Court previously denied Bunker’s petition on the ineffective assistance of  
10 counsel claims. Dkt. 13. Because the Court adopts the R&R in entirety on the  
11 prosecutorial misconduct claim as indicated below, no evidentiary hearing or discovery is  
12 needed to resolve the petition, meaning representation for Bunker is unnecessary as well.  
13 Accordingly, Bunker’s motion to appoint counsel is denied.

#### 14 **B. R&R**

15 Bunker’s motion for counsel raises broad objections to the R&R. *See* Dkt. 18 at 8  
16 (concluding with “So I contest all the proceeding[s] and challenge all decision[s] made  
17 by this Court and once again ask for an attorney as I still don’t know how any of this  
18 works.”). The district judge must determine de novo any part of the magistrate judge’s  
19 disposition that has been properly objected to. The district judge may accept, reject, or  
20 modify the recommended disposition; receive further evidence; or return the matter to the  
21 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

1 As indicated above, Judge Christel properly concluded that Bunker's petition  
2 should be dismissed. Dkt. 17. While Bunker may object to the adverse disposition  
3 recommended by the R&R, he fails to identify any issue not adequately and appropriately  
4 addressed by it. For example, while Bunker restates conclusory allegations seeking to  
5 point to holes in the evidence against him, Dkt. 18 at 1–4, he does not identify any reason  
6 to disturb the R&R's conclusion that because he failed to raise the prosecutorial  
7 misconduct claim in the state appellate courts, his petition should be dismissed. Bunker's  
8 objections to the R&R are therefore without merit.

9 The Court having considered the R&R, Bunker's motion to appoint counsel, Boe's  
10 response, and the remaining record, does hereby find and order as follows:

- 11 (1) Bunker's motion to appoint counsel, Dkt. 18, is **DENIED**.
- 12 (2) The R&R is **ADOPTED**;
- 13 (3) Bunker's federal habeas petition is **DISMISSED** with prejudice;
- 14 (4) A certificate of appealability is **DENIED**;
- 15 (5) Bunker's *in forma pauperis* status is **REVOKED** on appeal; and
- 16 (6) The Clerk shall enter **JUDGMENT** and close the case.

17 Dated this 4th day of April, 2019.

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20 BENJAMIN H. SETTLE  
21 United States District Judge  
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